

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Optical Telecommunications, Inc.)	MB Docket No. 14-258
)	CSR – 8895-C
Complaint Concerning Retransmission)	
of WXCW(TV), Naples, FL)	
)	
To: The Commission		

OPPOSITION TO APPLICATION FOR REVIEW

Optical Telecommunications, Inc. and HControl Corporation (collectively “OpticalTel”) hereby submit this Opposition to the Application for Review (“AFR”) filed in this proceeding on April 19, 2017 by DISH Network L.L.C. (“DISH”). As will be shown below, DISH’s AFR suffers from numerous fatal procedural defects. Moreover, DISH fails to identify any failure by the Media Bureau to faithfully apply longstanding Commission precedent and policy to the facts of this case, nor does DISH provide any evidence to suggest that the Media Bureau has made an erroneous finding as to an important or material question of fact. Accordingly, DISH’s AFR must be promptly dismissed with prejudice.

I. DISH's AFR Is Procedurally Defective.

A. DISH Does Not Enjoy Party Status.

The facts of this proceeding are summarized in the Order on Reconsideration ("Recon. Order") at paras. 2-4.¹ As the record makes clear, the only parties to this proceeding are Sun Broadcasting, Inc. ("Sun"), which filed a Complaint on December 4, 2014, and OpticalTel, which filed an Answer to the Complaint on April 14, 2015. The Commission released a Public Notice regarding Sun's Complaint on December 12, 2014 (Report No. 0424), and thus DISH could have secured party status by filing in response to that Public Notice, but DISH elected not to do so.

DISH seeks to achieve bootstrap party status due to the fact that the Media Bureau sent a letter to DISH seeking information deemed useful to the resolution of this matter. *See* Letter to Alison A. Minea, Director and Senior Counsel, DISH, from Steven A. Broeckert, Senior Deputy Chief, Policy Division, Media Bureau, dated November 16, 2015. The Media Bureau information request to DISH was properly served on Sun and OpticalTel. DISH's response to the Media Bureau letter, far from supporting DISH's claim of party status, in fact serves to reinforce that DISH has never been a formal party to this proceeding. Pursuant to Sec. 76.7(a)(3) of the Commission's Rules, Sun was required to serve a copy of its Complaint on any "interested person who is likely to be directly affected if the relief is granted." Thus, Sun served its Complaint on OpticalTel, but not DISH. As required by Commission Rules, all subsequent

¹ DA 17-265 (MB, March 20, 2017). It is again worth noting that OpticalTel owns no wires, cables, fibers or other physical distribution facilities at Sail Harbour. Broadcast signals retransmitted by DISH are received at a home satellite dish located on the property, then relayed to individual residents over customer premises equipment owned by the community on private property. Local broadcast signals are made available to residents of Sail Harbour at no separate charge, but rather are provided as a standard amenity of residence. *See* OpticalTel Answer at 1-2.

pleadings have been served on Sun and/or OpticalTel, as appropriate, the only parties to this proceeding.²

Notably, however, when DISH submitted its response to the Media Bureau's information request (nearly a month after the due date specified by the Bureau), it failed to serve the parties to this proceeding, Sun and OpticalTel, further establishing that DISH has not previously claimed party status. Not only did DISH fail to serve its response on the actual parties, the submission was redacted in its entirety. On January 25, 2016, OpticalTel expressed its strenuous opposition to DISH's grossly overbroad claim of confidentiality, and noted that "as a matter of fundamental due process, OpticalTel must be afforded a full and fair opportunity to review and respond to any materials submitted in this proceeding."³ After additional prodding from the Media Bureau, DISH submitted a somewhat less-redacted version of its response, but again failed to serve Sun or OpticalTel. In short, the fact that DISH was required to (reluctantly) respond to an inquiry letter from the Media Bureau did not serve to confer party status on DISH, nor does it provide standing to file an AFR.

B. DISH Has Failed To Show That It Has Been Aggrieved By The Recon. Order.

In apparent recognition that it is not a party to this proceeding, DISH seeks to establish its right to file an AFR by asserting two reasons why it believes it was "aggrieved" by the Recon. Order, neither of which withstands scrutiny.

1. *The Recon. Order Expressly Avoids Basing Its Decision On An Interpretation Of The Contract Between DISH And OpticalTel*

DISH claims that it has been aggrieved by the Recon Order's "mischaracterization" of the contract relating to Sail Harbour between DISH and OpticalTel and their respective

² See, e.g., 47 C.F.R. § 76.7(c)(1); §1.47.

³ Letter from Arthur H. Harding to Marlene H. Dortch dated January 25, 2016.

regulatory obligations under that agreement.⁴ DISH has apparently failed to read the Recon. Order carefully. Rather than attempting to parse contractual language, the Recon. Order is based entirely on a purely legal issue, the application of longstanding FCC precedent that “DBS resellers like OpticalTel are not MVPDs and thus are not subject to the obligation to obtain retransmission consent.”⁵ Thus, the Recon. Order properly concluded that

the factual question of whether OpticalTel’s agreement with DISH obligated OpticalTel to obtain retransmission consent is irrelevant for purposes of Commission enforcement of section 325 and its implementing rules. A DBS operator that provides a broadcast television station signal for distribution by a DBS reseller cannot shift its obligation to obtain retransmission consent by contractually delegating that obligation to the reseller.⁶

In short, the Recon. Order expressly avoided basing its decision on an interpretation of the contract between DISH and OpticalTel, and indeed finds that any purported assignment of regulatory obligations thereunder to be “irrelevant” for the purposes of its decision. Accordingly, DISH cannot claim to have been “aggrieved” by a “mischaracterization” of the DISH/OpticalTel contract when the Recon. Order declined to base its holding on, or otherwise construe or interpret, the terms of that agreement.

2. *The Recon. Order Does Not Hold That Satellite Carriers Always Hold Themselves Out As MVPDs*

DISH asserts that it is aggrieved by the Recon. Order “to the extent the Order could be interpreted as holding” that DBS operators like DISH always hold themselves out as MVPDs.⁷ Notably, DISH points to no language in the Recon. Order that “could” be read in the manner posited by DISH. Indeed, the fact that a FCC decision “could” be interpreted in some future case

⁴ AFR at 2.

⁵ Recon. Order, ¶5.

⁶ *Id.*

⁷ AFR at 2.

in a way that DISH might find objectionable provides no basis for an AFR of the Recon. Order. In any event, the plain language of the Recon. Order clearly establishes that the imaginary interpretation feared by DISH is pure fancy.

As the Recon. Order explains in detail, DBS operators like DISH do not “always” hold themselves out as MVPDs.⁸ Rather, the MVPD status of satellite signal delivery is determined by the facts of the specific situation. When a DBS operator is simply delivering specific channels selected by a customer that itself qualifies as an MVPD (such as a cable operator), it is exempt from retransmission consent because it is essentially operating as a common carrier (sometimes referred to as a “passive carrier”). In such cases, the DBS operator is not holding itself out as offering multiple channels of video programming for purchase by subscribers or customers, and thus does not meet the definition of “MVPD.” However, when DISH delivers its integrated multiple channel video offering for receipt by a home satellite dish (“HSD”), then the DBS operator is an MVPD and bears sole responsibility for obtaining retransmission consent, regardless of whether the HSD receiving the DISH service is located at a single family home, apartment, condo, or private community like Sail Harbour.

Thus, the Recon. Order goes on at length to explain that when a DBS operator engages in a common carrier function of delivering specified signals to an entity that itself qualifies as an MVPD, such as a cable operator, this provides “an exception to the general rule that the DBS operator remains responsible for obtaining retransmission consent, and that the exception for cable operators is logical given that cable operators (unlike DBS resellers) are themselves

⁸ Recon. Order, ¶¶6-7.

MVPDs and thus subject to the retransmission consent requirements and eligible for the compulsory copyright license.”⁹

In short, DISH’s sheer speculation that the Recon. Order “might” be interpreted as holding that DBS operators “always hold themselves out as MVPDs” is entirely unfounded. Because DISH has failed to demonstrate that it has been “aggrieved” by the Recon. Order, its AFR must be dismissed in accordance with Sec. 1.115(a) of the Commission’s Rules.¹⁰

C. DISH Fails To Show Why It Was Not Possible To Participate In Earlier Stages Of This Proceeding.

Substantively, DISH raises both factual and legal arguments in its AFR. Factually, DISH asserts that the Recon. Order has “mischaracterized” the agreement between DISH and OpticalTel, *e.g.*, by finding that OpticalTel acts as a DBS “reseller” and by failing to conclude that OpticalTel had agreed to assume DISH’s legal responsibility to obtain retransmission consent by electing DISH’s “transport” service. Legally, DISH claims that the Recon. Order has somehow misapplied long-standing Commission precedent, quoted verbatim in the Recon. Order, that when DBS operators like DISH authorize receipt of their service via HSD installations, the DBS operator bears sole responsibility for obtaining retransmission consent, even where the DBS operator contracts with an agent, reseller, program packager, equipment distributor, satellite equipment retailer or similar third party to facilitate receipt of the DBS service.¹¹ As will be shown in Section II below, DISH’s factual and legal arguments are entirely

⁹ *Id.* at ¶6.

¹⁰ *See, e.g., Little Rock Hispanic Education Family Foundation*, 31 FCC Rcd 13762 (2016); *Bernard Dallas, LLC*, 31 FCC Rcd 11107 (2016).

¹¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993), ¶ 131 (“1993 Broadcast Signal Carriage Order”).

without merit. In addition, because DISH has failed to explain why it was not possible for it to raise such arguments at earlier stages of this proceeding, it is foreclosed from filing an AFR.

OpticalTel's Petition for Reconsideration offered a detailed explanation, fully supported by the relevant contractual agreements between DISH and OpticalTel, to demonstrate that it has never elected DISH's "transport" option for receipt of DISH's DBS service at Sail Harbour and that it has never agreed to assume DISH's legal responsibility to obtain retransmission consent.¹² Similarly, OpticalTel's Petition for Reconsideration summarized controlling Commission rulings that DBS resellers like OpticalTel do not qualify as "MVPDs" and that the DBS operator bears sole responsibility for satisfying end-to-end retransmission consent and copyright requirements for the receipt by ultimate viewers of broadcast signals retransmitted by DISH to HSD installations.¹³

Notably, OpticalTel raised these same arguments nearly a year and a half earlier, when it submitted its Answer to Sun's Complaint on April 14, 2015.¹⁴ Even more significantly, on March 17, 2015, prior to filing its Answer, OpticalTel wrote directly to DISH to provide explicit notice of OpticalTel's position that it has never elected the "transport" option for receipt of broadcast signals at Sail Harbour and to remind DISH of FCC precedent providing that "when a satellite carrier such as DISH authorizes a reseller to deliver broadcast signals retransmitted by the satellite carrier, the satellite carrier bears sole responsibility for obtaining any retransmission consent authority necessary for delivery of such signals to residents of private communities

¹² Petition for Reconsideration at 2-9.

¹³ *Id.* at 10-12.

¹⁴ *See* OpticalTel Answer at 4-10.

served by such reseller,”¹⁵ and OpticalTel again put DISH on notice of its position in its letter dated January 25, 2016 that was served on DISH.¹⁶

D. The Media Bureau Has Not Been Afforded An Opportunity To Pass On The New Matters Raised By DISH.

Given DISH’s failure to participate during earlier stages of this proceeding, it is evident that the Media Bureau has not been afforded the requisite opportunity to pass on the factual and legal arguments DISH now seeks to raise in its AFR. Under Section 1.115(c) of the Commission’s Rules, this defect provides another independent basis requiring dismissal of DISH’s AFR.¹⁷

In sum, it is beyond dispute that DISH elected not to respond to OpticalTel’s Petition for Reconsideration or to otherwise challenge the facts and legal analysis submitted by OpticalTel at any stage in this proceeding. DISH’s assertion that it “had no reason to expect” that the Media Bureau would rule in favor of OpticalTel is disingenuous at best, and in any event does not excuse DISH’s prior silence and failure to participate on a timely basis. The Media Bureau has not been given the appropriate opportunity to address the matters that DISH now seeks to raise belatedly in its AFR. Finally, DISH has failed to show how it has been aggrieved by the Recon. Order. Thus, in accordance with Sections 1.115(a) and (c) of the Commission’s Rules, DISH’s AFR must be dismissed.

¹⁵ Letter from Arthur H. Harding to Brianna Anderson, March 17, 2015, attached hereto as Exhibit 1 (redacted to exclude confidential or proprietary information), citing 1993 Broadcast Signal Carriage Order, ¶ 131.

¹⁶ Letter from Arthur H. Harding to Marlene H. Dortch, January 25, 2016.

¹⁷ See, e.g., *Threshold Communications*, FCC 17-45 at n.10 (April 20, 2017); *Television Capital Corporation of Portland*, 32 FCC Rcd 1603 (2017); *Telecordia Technologies, Inc.*, 31 FCC Rcd 8444 (2016).

II. The New Factual And Legal Arguments Raised By DISH's AFR Are Without Merit.

A. OpticalTel Qualifies As A DBS Reseller At Sail Harbour.

DISH maintains that, under the terms of their contract, OpticalTel does not serve as a “reseller” of DISH DBS service, as that term is generally used by the FCC. Significantly, DISH quotes no language from the applicable contracts to support its unfounded claim. Indeed, numerous provisions in the relevant agreements clearly establish OpticalTel’s role as an authorized sales agent, with responsibility to facilitate sale and receipt of DISH’s DBS service on DISH’s behalf. As such, DISH bears sole responsibility for obtaining retransmission consent for any broadcast signals offered in connection with the DISH service.

When the FCC concluded in 1993 that DBS operators are required to obtain end-to-end retransmission consent for broadcast signals included in their DBS service, the Commission recognized that while DBS operators often “themselves sell retransmitted broadcast signals directly to HSD households” (typically in the single family home context), they “also license a variety of agents . . . to sell the signals on their behalf” (typically in the MDU or private community context).¹⁸ Thus, the term “DBS reseller” is generally understood by the FCC and within the industry to encompass this wide variety of third parties that help facilitate receipt of DBS service, including those serving as authorized sales agents that sell DBS service on behalf of the DBS operator.

OpticalTel’s responsibilities under its agreement with DISH are set forth in Section 4 of the Digital Programming Services Agreement covering Sail Harbour, a copy of which as fully executed by both parties was submitted in this proceeding as Exhibit 1 to OpticalTel’s letter to

¹⁸ 1993 Broadcast Signal Carriage Order, ¶131.

Lynne Montgomery dated October 15, 2015. Among other things, OpticalTel is responsible for:

- Installation, repair and maintenance of facilities located on private property at Sail Harbour used to relay the signals retransmitted by DISH to individual households on that property (Sec. 4.1);
- Securing and maintaining authorization from Sail Harbour for distribution of the DISH DBS service to residents (Sec. 4.3); and
- Providing customer service support covering such areas as billing, installation, repairs and response to telephone inquiries (Sec. 4.10).

Most significantly, pursuant to Sec. 4.7, OpticalTel is required to “market, promote, solicit and bill orders for Digital Programming at the standard residential retail prices set by EchoStar [*i.e.*, DISH] and may not markup, or receive additional consideration for, Digital Programming.”¹⁹ Moreover, OpticalTel “must label programming on Subscribers’ bills with EchoStar branded package names.” On the basis of this contractual provision alone, it is clear that OpticalTel’s fits squarely within the category of authorized sales agents that sell DBS service on behalf of the DBS operator, and thus are not MVPDs and accordingly are exempt from retransmission consent obligations.²⁰

B. OpticalTel Has Never Elected DISH’s “Transport” Option For Sail Harbour.

OpticalTel’s Petition for Reconsideration provided a detailed explanation, fully supported by applicable contractual documents, showing that it has never agreed to “transport” service for Sail Harbour or to assume DISH’s responsibility to secure appropriate retransmission consent from broadcast stations.²¹ In particular, OpticalTel demonstrated that the prior Bureau Order²²

¹⁹ Similarly, when it approved the assignment of various DBS resale agreements from Accelerated Broadband, L.L.C. to OpticalTel, DISH acknowledged OpticalTel’s role “to market, promote and sell DISH’s direct broadcast satellite multi-channel video, audio and data programming services.” See October 15, 2015 letter from Arthur H. Harding to Lynne Montgomery at Exhibit 2.

²⁰ See, e.g., *Campus Televideo, Inc.*, 31 FCC Rcd 12587 (MB, 2016) (authorized sales agent of DBS operator exempt from retransmission consent in connection with delivery of broadcast signals to MDU property).

²¹ Petition for Reconsideration at 2-9.

²² *Optical Telecommunications, Inc.*, 31 FCC Rcd 8952 (MB, Aug. 15, 2016).

erroneously relied on language in a footnote to Schedule 1 of the Bulk Agreement, a provision that was expressly “deleted in its entirety” in the final contract and was never binding on the parties.²³ Moreover, OpticalTel established that DISH never even offered a “transport” option until long after the Sail Harbour agreement was signed.²⁴ OpticalTel has also provided representative invoices to demonstrate that DISH has routinely billed OpticalTel at the non-transport, sub-distribution price for the local Ft. Myers broadcast signals, at the amount agreed upon originally when the Sail Harbour agreement was executed in 2005.²⁵

DISH offers no facts or evidence to refute or even challenge the record on this point as detailed in OpticalTel’s Petition for Reconsideration.²⁶ In any event, as explained in Sec. I.B.1. above, the Recon. Order has correctly determined that the issue of whether OpticalTel elected “transport” vs. “non-transport” or “subdistribution”²⁷ was deemed irrelevant for purposes of the legal ruling set forth in the Recon. Order, and hence this issue is simply not an appropriate basis for an AFR.

²³ Petition for Reconsideration at 3-4.

²⁴ *Id.* at 4-9.

²⁵ *Id.* at 9.

²⁶ Incredibly, DISH continues to hide behind Exhibit D to its January 5, 2016 LOI response as the only evidence to support its position, AFR at 6. Yet DISH steadfastly declines to place that document in the public record, even refusing to provide a copy to OpticalTel, the other party to that agreement, or to allow inspection by OpticalTel’s counsel under an appropriate protective order. *See* letter from Arthur H. Harding to Marlene H. Dortch dated May 3, 2016. In any event, OpticalTel has demonstrated that the agreement submitted as Exhibit D to DISH’s LOI response is undoubtedly identical to the agreement covering Sail Harbour provided by OpticalTel as Exhibit 1 to its October 15, 2015 response to the Media Bureau’s request for information. *See* OpticalTel Petition for Reconsideration at 3. As the provisions of that agreement clearly demonstrate, OpticalTel has never elected the “transport” option for Sail Harbour nor has it agreed to assume DISH’s legal responsibility to secure end-to-end retransmission consent.

²⁷ Citing to paras. 11-12 of the Bureau Order and OpticalTel’s Answer at 9 and Attachment 3, the Recon. Order states that DISH’s letter dated January 22, 2015 confirmed that, as of December 12, 2014, “it provided OpticalTel with transport services that included the right to retransmit WXCW’s signal to subscribers in both Sail Harbour and Glades.” Recon. Order, ¶ 3. While this statement is technically correct, in order to clear up any potential confusion, we note that DISH generally refers to its service that includes the right to retransmit broadcast signals as “non-transport,” and in fact DISH’s January 22, 2015 letter confirms that OpticalTel was authorized for “local network services (non-transport)” at Sail Harbour and other affected communities.

C. The Recon. Order Correctly Applied FCC Precedent Assigning DBS Operators With Retransmission Consent Obligations.

DISH suggests that its AFR should be granted based on its apprehension that the Recon. Order might be “read to leave open the implication that satellite carriers hold themselves out as MVPDs in all circumstances.”²⁸ As explained above in Sec. I.B.2., the Recon. Order made no such sweeping or inflexible pronouncement regarding the MVPD status of satellite carriers. Rather, the Recon. Order properly recognized that when a DBS operator is performing an essentially common carrier function of delivering broadcast signals selected by a customer that itself qualifies as an MVPD (such as a cable operator), the DBS operator is exempt from retransmission consent because it is not offering the affected broadcast signals as part of its own MVPD package of signals available for purchase by ultimate subscribers. However, a “DBS operator that provides a broadcast television station signal for distribution by a DBS reseller cannot shift its obligation to obtain retransmission consent by contractually delegating that obligation to the reseller.”²⁹

DISH seems to suggest that its exemption from retransmission consent should depend on whether the service is provided “without the use of a home satellite dish.”³⁰ This appears to be a meaningless distinction, given our understanding that DISH’s satellite transmissions are routinely received by a home satellite dish, even by cable operators who have contracted with DISH for transport delivery of specific broadcast signals.

Instead, a more meaningful analysis should focus on the nature of the signals being delivered, and the recipient’s rights and business activities relating to those signals. True

²⁸ AFR at 7.

²⁹ Recon. Order, ¶ 5.

³⁰ AFR at 7.

MVPDs, such as cable systems or SMATV operators,³¹ are in the business of acquiring video signals from multiple sources, packaging those signals to meet customer needs, and pricing their offerings in response to marketplace dynamics. In short, such MVPDs satisfy the fundamental aspect of the FCC's MVPD definition because they "make[] available for purchase, by subscribers or customers, multiple channels of video programming."³² In such situations, DISH can qualify for the exemption from retransmission consent so long as 1) the choice of the signals to be received rests solely with the MVPD customer, 2) the MVPD customer is free to brand and package the video programming as it sees fit, and 3) DISH cannot dictate the retail price charged by the MVPD customer for providing such signals to the ultimate viewer.

As explained above, under OpticalTel's agreement with DISH covering Sail Harbour, DISH alone establishes the package of broadcast signals available for delivery, DISH dictates use of its own branding, and DISH establishes the retail price. Similarly, DISH "has the sole right to change, edit, select, schedule and determine the Digital Programming services contained in the Digital Programming packages set forth in Schedule 1 or otherwise offered and to determine and change fees such Digital Programming."³³ Just as a DBS reseller/sales agent is not required to enter into separate affiliation agreements with ESPN, USA, MTV, HBO or the other programming networks offered by the satellite carrier, so too is the DBS reseller not obligated to obtain separate retransmission consent for the broadcast signals retransmitted by the satellite carrier. Hence, unlike true MVPDs, OpticalTel is not making available for purchase, by

³¹ OpticalTel works with its private community partners to provide the best possible telecommunications service solutions, including video, voice and Internet. In some cases, satellite master antenna television ("SMATV") facilities are utilized for direct off-air reception of television broadcast signals at a particular private community or MDU, in which case applicable regulatory implications arise. There are no SMATV facilities at Sail Harbour, and thus DISH's suggestion that OpticalTel should be deemed a SMATV operator is unfounded. DISH AFR at 5-6.

³² See 47 C.F.R. § 76.64(d).

³³ Digital Programming Services Agreement, Sec. 3.1.

subscribers or customers, its own MVPD service, but rather is merely providing the DISH DBS service for sale on DISH's behalf. Under such circumstances, as the Recon. Order correctly concluded, OpticalTel is not a MVPD and is not subject to retransmission consent obligations.

CONCLUSION

As shown above, DISH was not a party to the proceeding leading up to the Recon. Order and has not demonstrated why it was unable to participate at an earlier stage. DISH now seeks to raise legal and factual matters that it has failed to address initially to the Media Bureau. Finally, DISH has been unable to show that it has been aggrieved by the Recon. Order. Thus, DISH's AFR suffers from numerous procedural defects that are fatal under Sections 1.115(a) and (c) of the Commission's Rules. Substantively, DISH does not demonstrate any failure by the Media Bureau to faithfully apply longstanding Commission precedent and policy to the facts of this case, nor does DISH provide any evidence to suggest that the Media Bureau has made an erroneous finding as to an important or material question of fact. Accordingly, DISH has not satisfied the requirements of Section 1.115(b) of the Commission's Rules.

Based on all of the foregoing reasons, DISH's AFR should be dismissed with prejudice.

Respectfully submitted,

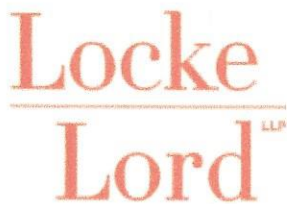
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Date: May 4, 2017

Exhibit 1



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March 17, 2015

Ms. Brianna Andersen
Dish Network L.L.C.
9601 South Meridian Boulevard
Englewood, Colorado 80112

Re: *HControl Corporation*

Dear Ms. Andersen:

As you know, HControl Corporation ("HControl") and EchoStar Satellite L.L.C. ("Dish") are parties to a Bulk Programming Services Agreement and a Digital Programming Services Agreement (collectively, the Programming Services Agreements ("PSAs")), each dated as of December 1, 2005, and as amended by the Neighborhood Value Program Amendment, authorizing HControl to resell the Dish Programming (as defined in the PSAs, as amended), including the Local Packages consisting of various local television broadcast signals as selected by Dish, to Sail Harbour, a private development in Fort Meyers, Florida. HControl also resells Dish Programming under similar agreements to Glades Country Club, a private development in Naples, Florida. [REDACTED]

By letter dated September 29, 2014, Sun Broadcasting, Inc. ("Sun"), licensee of television station WXCW(TV), Naples, Florida, purported to elect retransmission consent with respect to "every Cable System owned or operated by OpticalTel within the Fort Myers/Naples, FL DMA" for the election cycle commencing January 1, 2015. Neither OpticalTel nor HControl had ever previously received any must-carry/retransmission consent election or other carriage request from WXCW(TV). Moreover, to the best of their knowledge, HControl and OpticalTel do not believe the facilities at either Sail Harbour or Glade Country Club are "Cable Systems" for regulatory purposes.

Shortly after its retransmission consent election, by letter dated October 1, 2014, Sun alleged that the WXCW signal was being delivered to residents of Sail Harbour and Glades Country Club without appropriate retransmission consent. Then, on December 4, 2014, Sun submitted a Complaint to the FCC claiming a violation of the retransmission consent requirements with respect to the delivery of WXCW as part of the Dish service provided to Sail Harbour and Glades Country Club. In its Complaint, Sun asserted that back in January, 2014, Sun had contacted Ms. Melisa Ordonez, General Manager, Programming Acquisitions for Dish, and claimed that Ms. Ordonez informed Sun that Dish provides only "transport" services to OpticalTel and "does not provide

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OpticalTel with any rights to retransmit the signal of WXCW.”¹ Upon receipt of Sun’s Complaint, OpticalTel contacted Dish for clarification, and was advised that Dish now offers two options to resellers with respect to delivery of local broadcast signals retransmitted by Dish: “Local Networks” for [REDACTED] and “Local Networks Transport” [REDACTED], rather than the single option that was offered to HControl in 2005 when it entered into PSAs for Sail Harbour.

HControl confirmed that in more recent PSAs, such as the PSA covering Cypress Trails RV Resort dated November 6, 2013, Dish does in fact offer both options: “Local Networks” and “Local Networks Transport.” As evident from the election of “Local Networks” (and not “Transport”) on the Cypress Trails PSA, HControl has always intended to obtain full rights for delivery of local broadcast signals in communities where such signals are not received primarily through a master antenna system. Accordingly, to the extent that Dish may have inadvertently been treating Sail Harbour and Glades Country Club as “Transport” properties, HControl requested that such status be rectified. Thus, by letter dated January 22, 2015, Dish confirmed that, effective December 12, 2014, OpticalTel/HControl would be deemed fully authorized for resale of the local broadcast signals retransmitted by Dish on a non-transport basis at both Sail Harbour and Glades Country Club.

Sun has been advised of this development, but continues to assert violations of the retransmission consent requirements for periods prior to December 12, 2014, and even prior to its first formal assertion of non-compliance on October 1, 2014. As you may know, the FCC has determined that when a satellite carrier such as Dish authorizes a reseller to deliver broadcast signals retransmitted by the satellite carrier, the satellite carrier bears sole responsibility for obtaining any retransmission consent authority necessary for delivery of such signals to residents of private communities served by such reseller. In other words, in such situations, it is the satellite carrier that qualifies as a “multichannel video programming distributor” (“MVPD”). The reseller, who provides no transmission paths and does not make multiple channels of video programming available for purchase by subscribers or customers generally, does not meet the definition of “MVPD” and thus is not subject to retransmission consent obligations.² Notably, designation by the

¹ We note that Ms. Ordonez is not the representative for HControl’s account with Dish, HControl does not recall ever dealing with Ms. Ordonez, and HControl has no record of being notified by Dish with respect to Sun’s efforts to tortiously interfere with the HControl/Dish contractual relationship. Moreover, to the extent Sun has accurately represented the statements by Ms. Ordonez, they appear to be incorrect – HControl has no record of ever being offered an option between “transport” and “non-transport” with respect to either Sail Harbour or Glades Country Club.

² See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965 (March 29, 1992) at ¶ 131; Implementation of the SHVIA of 1999, Broadcast Signal Carriage and Retransmission Consent Issues, 16 FCC Rcd 1918 (Nov. 30, 2000) [noting that, beginning on May 29, 2000, satellite carriers must obtain retransmission consent for delivery of local broadcast signals to viewers (¶ 14); that retransmission consent elections for satellite carriers apply on a market-wide, rather than system-by-system basis (¶ 24); that broadcasters only deal with DirecTV and EchoStar (not resellers) with regard to local-into-local carriage matters (¶ 28); and that the term “distributor” in § 338(h)(1) of the Communications Act, which appears to encompass the function of satellite carrier resellers, has no bearing to the must-carry/retransmission consent

Ms. Brianna Andersen
Dish Network L.L.C.
March 17, 2015
Page 3

satellite carrier of its authorization to resell retransmitted local broadcast signals as "transport" or "non-transport" does not alter the conclusion that the reseller, whose activities are limited to the relay of signals retransmitted by a satellite carrier over private property for home viewing, is not an MVPD and the satellite carrier is solely responsible for obtaining any necessary retransmission consent.

In light of HControl's valued relationship with Dish, we believe that the most prudent course to avoid potential liability by either Dish or HControl/OpticalTel to local broadcasters retransmitted by Dish to residents at Sail Harbour and Glades Country Club is to ensure that all payments are made to rectify HControl's status as a "non-transport" reseller, as was intended all along. Although HControl is not aware of the exact date when Dish began offering different rates for "transport" vs. "non-transport," we are willing to true-up these payments back to January 1, 2012. While we would of course welcome your review of our figures, we calculate that such payments amount to [REDACTED], which Dish would then be able to apply towards any additional retransmission consent or copyright liability relating to its retransmission of the Fort Myers/Naples broadcast stations. See Attachment 1.

HControl/OpticalTel greatly appreciate your cooperation in this matter, and again wish to emphasize the tremendous value placed on the long relationship with Dish. We remain hopeful that the approach we have suggested will avoid a protracted and uncertain proceeding before the FCC and/or other potential litigation.

We would of course welcome the opportunity to discuss any questions or concerns you may have.

Very truly yours,



Arthur H. Harding
Counsel for HControl Corporation

cc: Mario Bustamante

obligations imposed on satellite carriers (§ 135), thereby reaffirming the FCC's previous determination that it is the satellite carrier, and not the reseller, that is the MVPD.]

HControl/OpticalTel
Dish Broadcast Resale True-up

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

GRAND TOTAL: [REDACTED]

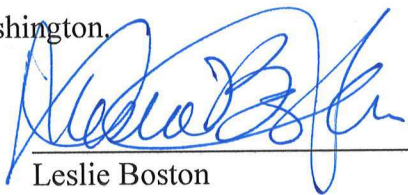
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I sent, by first class U.S. mail and electronic delivery, a true and correct copy of the Opposition to Application for Review filed by Optical Telecommunications, Inc. and HControl Corporation, Inc. on May 4, 2017 to:

Wayne Johnsen, Esq.
WILEY REIN LLP
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Jeffrey H. Blum
Alison Minea
Hadass Kogan
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1110 Vermont Ave., N.W., Suite 750
Washington, D.C. 20005

Dated May 4, 2017, at Seattle, Washington.



Leslie Boston
Legal Assistant